Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

VINCENT FEDERICO,
Petitioner

v.

PAUL DIPAOLO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTION PRESENTED FOR REVIEW

Should the new AEDPA requirements on second habeas corpus petitions be applied retroactively to a state petitioner whose first habeas corpus petition was filed before AEDPA was enacted?

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OPINION BELOW

The opinion of the First Circuit is not reported, but appears in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit entered on April 8, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The petitioner is aware of 28 U.S.C. §2244(3)(E) but argues that its application to him would have impermissible retroactive effect.

THE STATUTORY PROVISION INVOLVED

28 U.S.C. §2244 provides:

§2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or

(B)(i) the factual predicate for the

claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30

days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the

writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review:

(B) the date on which the impediment to filing an application created by State action violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioner, together with two codefendants, was indicted by a Massachusetts grand jury on April 20, 1978, for murder. A jury convicted petitioner of second-degree murder on December 22, 1978, and the court (McGuire, J.) sentenced him to life imprisonment. Codefendant Thomas Casale was also convicted of second-degree murder; codefendant Joseph Bruno received a directed verdict of acquittal from the trial court after the jury convicted him of second degree murder. The Massachusetts Supreme Judicial Court affirmed the petitioner's and Casale's convictions on July 17, 1980. *See Commonwealth v. Casale*, 381 Mass. 167 (1980). Petitioner unsuccessfully pursued a motion for new

trial through the state courts in 1982 through 1983.

Petitioner and Casale filed a joint federal habeas corpus petition in 1985. The district court denied the petition on February 17, 1987, *Casale v. Fair*, 653 F.Supp. 856 (D.Mass. 1987), and the First Circuit affirmed the denial of the petition on November 18, 1987, *Casale v. Fair*, 833 F.2d 386 (1st Cir. 1987).

Petitioner filed his second motion for new trial in state court in 1993. Included with that motion was the affidavit of codefendant Casale, who admitted he was the shooter and exculpated the petitioner. Since the original trial judge was not available, a new judge (Hamlin, J.) heard the motion. Without holding an evidentiary

hearing, she denied the motion on February 8, 1996. The Massachusetts Appeals Court affirmed the denial of the new trial motion in an unpublished decision on July 1, 1997. The Supreme Judicial Court denied the petitioner's application for further appellate review on September 3, 1997.

The petitioner then sought leave to file a second habeas corpus petition in the First Circuit pursuant to 28 U.S.C. §2244. The petitioner argued to the First Circuit that he was entitled to file his habeas corpus petition pursuant to 28 U.S.C. §2254, and that the application of the new provisions in 28 U.S.C. §2244 to his case would have an impermissible retroactive effect. In an unpublished order, the First Circuit denied the petitioner leave to file

his habeas corpus petition in the district court.

REASONS WHY THE WRIT SHOULD BE GRANTED

When Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA"), it codified a standard for abuse of the writ by a state petitioner claiming actual innocence as a procedural gateway to have an otherwise barred constitutional claim considered on the merits. *See* 28 U.S.C. §2244(b)(2)(B):

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> (A) . . . .; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a

> whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Prior to this legislation, the standard was a matter of case law. In *Schlup v. Delo*, 115 S.Ct. 851 (1995), this Court spelled out the standard to be applied and the method of application. Adopting the *Carrier* standard and rejecting the *Sawyer* standard (clear and convincing evidence) for claims of actual innocence asserted to void procedural barriers, this Court held that a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. It is clear that Congress reversed the *Schlup* Court's

rejection of the *Sawyer* standard and reimposed it; the next question then becomes whether the legislation changes any other aspect of *Schlup*. Is "the claim" in §2244(b)(2)(B)(i) the claim of actual innocence, or is "the claim" the underlying constitutional error? In the former case, the "new" evidence of innocence requirement of *Schlup* remains basically unchanged. In the latter case, a procedural hurdle not suggested in *Schlup* will have been imposed; a hurdle which will block many litigants not blocked by *Schlup*. In the case at bar, the respondent argued in his pleadings to the First Circuit that Congress eliminated this aspect of *Schlup* also. Although the First Circuit's opinion here is not that clear, it applied some new AEDPA standard,

and found no impermissible retroactive effect.

It is the petitioner's position that the new restrictions in AEDPA should not be applied to him.

Applying AEDPA's new restrictions[1] to his case would "attach [ ] new legal consequences to events completed before its enactment," and would thus have impermissible retroactive effect. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994). This basic argument has been accepted by the Sixth Circuit. *See In re Hanserd*, 123 F.3d 922 (6th Cir. 1997).

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1 The new restrictions include the new actual innocence standard, the gatekeeper requirements of first filing in the circuit, and the removal of the right to ask for rehearing or petition for certiorari.

When this applicant filed his initial §2254 petition, the law would have allowed him to raise the claims raised here in a second petition. Under AEDPA, that apparently is not so. Applying the new statute would thus attach severe new legal consequences to his having filed a first habeas petition. Because Congress has not expressed an intent that the new Act have such a retroactive effect, it should not be applied in this way. *See id.* at 931.

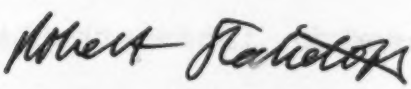
Whether or not the AEDPA restrictions on second habeas corpus petitions should be given retroactive effect is an important question of federal law that should be settled by this Court. The Circuits are in disarray on this issue. See discussion in *United States v. Ortiz*, 136 F.3d 161, 165-

66 (D.C. Cir. 1998).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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Opinion of the First Circuit
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 98-8010

VINCENT FEDERICO,
Petitioner,

v.

PAUL DIPAOLO,
Respondent.

Before

Torruella, Chief Judge,
Selya and Stahl, Circuit Judges.

ORDER OF COURT

Entered April 8, 1998

Petitioner Federico seeks authorization from this court to file a second habeas corpus petition seeking relief from his conviction for second degree murder. We deny his application.

Federico has failed to make out a

prima facie showing that he satisfies either of the statutory prerequisites for filing a successive petition contained in 28 U.S.C. §2244(b)(2). On the one hand, he has not shown that any claim he makes of alleged legal errors at his trial "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2244(b)(2)(A). On the other, the proffered affidavit of a codefendant, weak evidence in itself, see Dirring v. United States, 353 F.2d 519, 520 (1st Cir. 1965), and found by the state court to be unreliable, is insufficient to make a prima facie showing that, if such evidence had been introduced at trial, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. §2244(b)(2)(B)(ii).

Finally, we find no impermissible retroactive effect in the application of the Antiterrorism and Death Penalty Act of 1996 to the instant case.

The application to file a second habeas corpus petition is denied.

By The Court

PHOEBE MORSE, Clerk